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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

PRESTON PRODUCTS COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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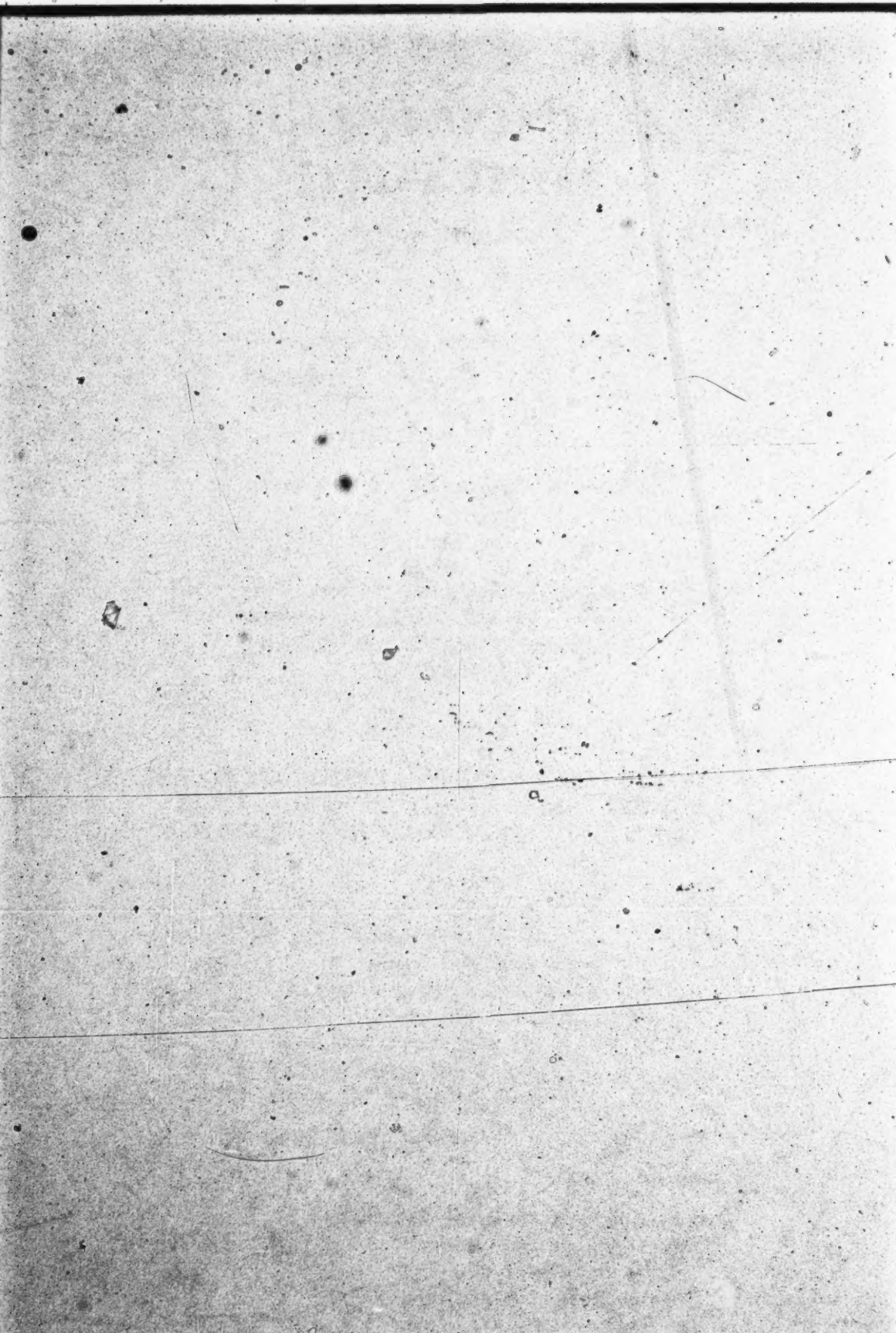

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, Preston Products Company, Inc. petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, enforcing, as modified, the order of the National Labor Relations Board.

from a majority of employees in the bargaining unit, and that the Union had made a proper demand for recognition on the employer. As a result, he ordered the employer to bargain with the Union on demand without the necessity of another election being held.

On the issue which is crucial to this petition for a writ of certiorari, the Trial Examiner found that 78 out of a possible 144 employees in the bargaining unit signed valid authorization cards. Although the cards of two employees were disallowed because they were found to be solicited on the misrepresentation that they would be used "*only*" to secure a secret ballot election before the NLRB, the remaining cards were counted to show majority representation.

The Trial Examiner found these cards to be valid designations of bargaining authority even though at least fourteen employees testified variously that they had not read the cards or that they had been told unequivocally that there would be an election and that they could vote as they chose at that time. One employee even testified that she had told the card solicitor that she would sign a card because it didn't matter since she could vote "No" anyway. In spite of this testimony and in spite of the fact that no card solicitor took the witness stand in rebuttal, the Trial Examiner counted these cards, finding that each card on its face was an unequivocal designation of bargaining authority, that he didn't believe an employee could fill in the blanks on a card without reading the card, and that the employees, in his opinion, understood these legal documents at the time they signed them (J.A. 675-712).

Both sides appealed to the Board, the Company because it contended that a majority of employees had not clearly indicated an intention of designating the Union as their bargaining agent, and the Union because it requested a new compensatory remedy for the wages lost by the employer's refusal to bargain. The Board dismissed the Union contention as being without merit, but in all other aspects upheld the findings of the Trial Examiner.

B. The Decision of the Court of Appeals

Pursuant to Section 10(f) of the Act, the Union petitioned the United States Court of Appeals for the District of Columbia Circuit to review the Board's Decision and Order, while the Company petitioned the United States Court of Appeals for the Sixth Circuit, in which circuit the Company is located and doing business, to also review that Decision and Order. Subsequently the District of Columbia Court of Appeals ruled that it, the District of Columbia Circuit, was not a proper forum for hearing the case and transferred the entire case to the Sixth Circuit. The Union, however, petitioned the District of Columbia Circuit for a rehearing and ultimately that Court vacated its earlier order and requested the Sixth Circuit to return the proceedings, which was done.

After hearing the case on the merits, the Court sustained the Board's findings that the Company had refused to bargain with the Union in good faith because, according to the Court, the Union had received valid authorization cards from a majority of employees. The Court, furthermore, remanded to the Board the question of further compensatory relief for the alleged loss of collective bargaining rights during the time the case has been in litigation, and that issue is therefore not before the Court at this time. (App. A, *infra*, p. 26).

Senior Circuit Judge Miller dissented and called attention to the case of *NLRB v. Swan Super Cleaners, Inc.*, 384 F.2d 609 (6th Cir. 1967). He further stated that "authorization cards obtained by misrepresentation as to their purpose must be invalidated, even though the unambiguous language of the cards amounts to a choice of the union as bargaining representative" (App. A, *infra*, p. 27).

REASONS FOR GRANTING THE WRIT

Whether a union should be granted bargaining rights after losing a secret ballot election conducted by the National Labor Relations Board is an issue which is not only the source of continual litigation both before the National Labor Relations Board and the various courts of appeals, but also a question at the very foundation of employee Section 7 rights, rights which include both the freedom to organize together through a labor organization *"of (one's) own choosing"* as well as the right to *"refrain from any or all of such activities"*.[2]

These card check cases have been evolving since 1964 when the National Labor Relations Board decided its now famous *Bernel Foam Products Co.* case, *supra,* a case which overturned a Board policy of some ten years' standing and allowed a union to request and receive bargaining rights even though it had lost a National Labor Relations Board conducted election. Before a union can succeed in one of these card check cases, it is required to meet various requirements, one of which is valid representation authorization from a majority of employees in the bargaining unit.[3] Union authorization cards will be used to prove the Union's majority status if the cards *"fairly reflect an intention of the signers to designate the Union as their bargaining agent."*[4]

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[2] 29 U.S.C. 157.

[3] The other requirements are lack of a good faith doubt as to the authenticity of the cards and a proper demand for recognition by the Union. *Amalgamated Clothing Workers of America v. NLRB (Sagamore Shirt),* 365 F.2d 898, 906 (D.C. Cir. 1966).

[4] Id. at 906.

It is here, when deciding what kinds of cards fairly reflect this intention of the signers, that the courts of appeals disagree.[5]

In *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enforced, 351 F.2d 917 (6th Cir.),[6] the Board stated that authorization cards which are clear on their face will suffice to prove majority status unless the card solicitor indicated to the signer that the card was needed *only* to procure a Board election. Only by such a material misrepresentation, said the Board, would a card be disregarded as proof of the signer's interest in joining the union.

Only two circuits, the District of Columbia Circuit which decided the instant case and the First Circuit, have given their unqualified approval to the Board's *Cumberland Shoe* doctrine. See *National Labor Relations Board v. Southbridge Sheet Metal Works, Inc.*, 380 F.2d 851, 855-856 (1st Cir. 1967).

Six of the remaining circuits have either rejected the rule, or so altered it that it has little validity today. Three of these circuits, the Fourth, Fifth and Eighth, have rejected the rule. *National Labor Relations Board v. Crawford Manufacturing Co., Inc.*, 386 F.2d 367 (4th Cir. 1967), Petition for Cert. filed, 36 U.S.L. Week 3390 (U.S. Jan. 25, 1968) (No. 1050); *National Labor Relations Board v. Logan Packing Co.*; 386 F.2d 562 (4th Cir. 1967); *National Labor Relations Board v. Sehon Stevenson & Co.*, 386 F.2d

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[5]At least one author has suggested that the threshold question of whether the Board has authority to grant authorization short of a secret ballot election is one which should be answered negatively. See note, *Union Authorization Cards*, 75 Yale L.J. 805, 809-818 (1966) and also *National Labor Relations Board v. Nichols Co.*, 380 F.2d 438, n. 1 (2nd Cir. 1967).

[6]But see *National Labor Relations Board v. Swan Super Cleaners, Inc.*, 384 F.2d 609 (6th Cir. 1967).

551 (4th Cir. 1967); *Engineers & Fabricators, Inc. v. National Labor Relations Board*, 376 F.2d 482, 486-487 (5th Cir. 1967); *National Labor Relations Board v. Peterson Bros.*, 342 F.2d 221 (5th Cir, 1965); *Bauer Welding and Metal Fabricators v. National Relations Board*, 358 F.2d 766 (5th Cir. 1966).

The remaining three circuits, the Second, Sixth and Seventh, while not flatly rejecting the rule, have substantially disagreed with the Board's interpretation of the rule. *National Labor Relations Board v. Nichols Co.*, 380 F.2d 438 (2nd Cir. 1967); *National Labor Relations Board v. Swan Super Cleaners, Inc.*, 384 F.2d 609 (6th Cir. 1967); *National Labor Relations Board v. Dan Howard Mfg. Co.*, ... F.2d ....., 67 LRRM 2278 (7th Cir. 1968).

In *Swan Super Cleaners*, the Sixth Circuit, while not expressly overruling its *Cumberland Shoe* affirmance, stated that the Board could not, as it had done, read *Cumberland Shoe* as its authority to apply a mechanical rule of vitiating cards only when the solicitor has actually employed the phrases "solely for an election" or "only for an election" in his sales talk. Instead the Court stated that "whatever the style or actual words of the solicitation, if it is clearly calculated to create in the mind of the one solicited a belief that the *only purpose of the cards is to obtain an election,*"[7] the card must be disregarded in proving majority status. The Seventh Circuit in *Dan Howard Mfg. Co.* indicated that it would follow the *Swan Super Cleaners'* "restatement" of the *Cumberland* rule.[8]

The Second Circuit in *Nichols* carefully analyzed not only its reasons for not accepting the mechanical application of *Cumberland Shoe*, as applied by the Board, but also made a detailed analysis of how working men and

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[7] 384 F.2d at 618.

[8] ..... F.2d ....., 67 LRRM at 2281.

women are solicited and asked to sign authorization cards. The decisive question, said the Court in *Nichols*, is whether the employees "meant to make the Union their representative" or instead "understood the cards not to be votes for the Union" but rather requests "that an election should be called at which they would vote for or against the Union as they then pleased."[9]

In refusing to apply what it considered to be the wooden, mechanistic tests of *Cumberland Shoe*, the Court said:

> But while clarity should constitute the beginning of any effort to show a majority on the basis of authorization cards, it is not the end; the clearest written words can be perverted by oral misrepresentations, especially to ordinary working people unversed in the "witty diversities" of labor law. It is all too easy for the Board or a reviewing court to fall into the error or thinking that language clear to them was equally clear to employees previously unexposed to labor relations matters; to treat authorization cards, which union organizers present for filling out and signing and then immediately take away, as if they were wills or contracts carefully explained by a lawyer to his client is to substitute form for reality.[10]

The decisive question still is whether the employees "meant to make the Union their representative" or instead "understood the cards not to be votes for the Union" but rather requests "that an election should be called at which they would vote for or against the Union as they then pleased." In *Nichols* the Court indicated that a practical, realistic approach must be taken in answering this question rather than the purely legalistic one of *Cumberland Shoe*, which although reasonably applied to the

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[9]380 F.2d at 444.

[10]380 F.2d at 442.

legal validity of contracts which have been explained to clients in the quiet, supposed expertise of a lawyer's office, cannot be applied with equal realism to the meaning of a signature on an authorization card solicited over a beer in the camaraderie of a smoke-filled, noisy tavern.

Yet treating the authorization cards in the instant case with the same efficacy as if they had been signed in a lawyer's office is exactly what the Board and eventually two of the three judges in the court of appeals did in the instant case.[11] For the Board to treat the cards in such a legalistic manner is somewhat surprising since the Board itself, albeit when composed of different members, called authorization cards a "notoriously unreliable method of determining majority status of a union . . ."[12]

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[11]One such brief example for the Court's review should help place this case in proper context.

Without rebuttal Overia Harris testified that she was approached in the rest room by a fellow employee, Betty Beach, and asked to sign a card. Mrs. Harris, who never attended any Union organizing meetings testified: "I was in the rest room and she said would you sign a card for an election and I said yes but I am not going to vote for the Union." (J.A. 685-686).

In spite of this testimony which stood unchallenged since Betty Beach did not take the witness stand, and in spite of the fact that this employee testified she had not read the card, the Trial Examiner counted her card as a valid designation of bargaining authority. Without any countervailing testimony, the Trial Examiner discredited Mrs. Harris' testimony and found she had read the plain and unambiguous language of the card and knew its purpose (J.A. 686).

In spite of this testimony and in spite of similar testimony of many other Preston employees, the Union, which had only a scant majority of six cards and which lost the election 90 to 45, was ordered to be certified as bargaining agent.

[12]*Sunbeam Corp.*, 99 NLRB 546, 550-551 (1952).

If this case had arisen in any of the six circuits discussed *supra,* and especially in either the Sixth Circuit,[13] the Second Circuit or the Fourth Circuit, it is submitted that a different result would have been reached because of the closer scrutiny of the card solicitation process taken by those courts and because the burden of proof would have been on the Board to prove that a majority of employees meant to make the Union their representative when they signed cards, rather than on the Company to disprove the validity of the cards.[14]

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[13]What should have been the appropriate forum was also initially at issue in the instant case. Preston Products' only plant is located in Grand Rapids, Michigan. It was only because the Union won the *"race to the court house"* and filed its appeal in the Court of Appeals for the District of Columbia Circuit before the Company filed its appeal in Cincinnati in the Court of Appeals for the Sixth Circuit that this case arose in the District of Columbia Circuit at all. The case was transferred to the Sixth Circuit initially by order of the Court dated July 19, 1966, but eventually was retransferred to the District of Columbia after a rehearing on the motion to transfer (373 F.2d 671).

[14]The circuits are equally split in deciding who has the burden of proof in these cases, the General Counsel, as the representative of the charging party to prove that the cards were signed free of any misrepresentation or the respondent company, to prove that the cards were signed because of misrepresentations. See *Engineers and Fabricators, Inc. v. NLRB, supra,* at 487 for a detailed analysis of why the Fifth Circuit feels the burden of proof remains with the Board as the moving party, to prove that the cards are signed free of any misrepresentations.

One author, Professor Howard Lesnick, in *Establishment of Bargaining Rights Without an NLRB Election,* 65 Mich. L. Rev. 851 (1967) has suggested that all the cards procured by a solicitor should be very carefully scrutinized if the solicitor is shown to have made any misrepresentations. If such a rule had been applied in the instant case, the Union would have been unable to prove its majority status.

Because of the divergent views in the various Courts of Appeals, because of the importance of this issue to an orderly formulation of our national labor policy, and because of the recurring nature of the question, it is appropriate for this Court to grant review in this case and resolve these questions.

CONCLUSION

For the foregoing reasons, and especially because of the direct conflict with the decision in the Fourth Circuit, *National Labor Relations Board v. Crawford Manufacturing Co., Inc., supra,* which case is presently before the Court on petition for writ of certiorari, we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 23, 1968

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,137

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

PRESTON PRODUCTS COMPANY, INC., Intervenor

No. 20,185

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

PRESTON PRODUCTS COMPANY, INC., Respondent

No. 20,301

PRESTON PRODUCTS COMPANY, INC., Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, Intervenor

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Petitions to Review and Cross-Petition to Enforce an Order of the National Labor Relations Board

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Before WILBUR K. MILLER, *Senior Circuit Judge*, and DANAHER and WRIGHT, *Circuit Judges*.

WRIGHT, *Circuit Judge*: These consolidated cases relate to an order of the National Labor Relations Board issued on April 22, 1964, against Preston Products Company. The Board found that the company had violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.* (1964), and ordered it to cease and desist from infringing upon the rights guaranteed to its employees by Section 7 of the Act and to bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, as the exclusive bargaining representative of the company's employees. The union's request that the Board grant appropriate relief to compensate the workers for the period during which the company had wrongfully refused to bargain was denied. Nos. 20,137 and 20,301 are petitions by the union and the company respectively to review the Board's order, and No. 20,185 is the Board's petition to enforce that order.

I

Preston Products Company, located in Grand Rapids, Michigan, is owned and managed by the Preston brothers, Anthony and Albert. In early March 1964 the union began organizational activities at the request of several employees at the plant. On March 18, the Preston brothers, who had been told that "there was a union movement on," convened meetings of the workers during paid overtime. They invited complaints from the employees, asking "just who it was that wanted the union in there" and "just what was it that * * * a union could do" that could not be done directly by the employees. The Prestons stated that the union had caused various companies to go out of business or move their plants, that the employees would not get anything more than they had now and might in fact lose such currently enjoyed benefits as bonuses, parties and turkeys, and finally that the brothers might simply "get disgusted" and then they "didn't know just what would happen."

Despite these meetings, by March 20 the union had accumulated valid authorization cards from 78 of the 144 employees in the appropriate bargaining unit. The union then requested the Preston brothers to bargain. This request was at first ignored and later denied. Neither would the Prestons agree to submit the cards to a neutral third party for verification. Subsequently, the union filed a petition with the Board, requesting that it be certified as the bargaining representative. At a formal Board hearing on April 7, the company and the union agreed on an appropriate bargaining unit, but since the company stated that it "needed as much time as possible for the campaign," the Board denied the union's request for an immediate election and scheduled the election for May 11, 1964.

Prior to the election, the company conferred various benefits upon the employees. In response to the complaints solicited from the employees at the March 18 meetings, the company reduced by 50 per cent the cost of work gloves which it sold to the employees in the racking department, increased the equipment in the lunch room and ladies room, changed the method of deducting the employees' share of a hospital insurance plan, and promoted one employee who had inquired about advancement. In addition, from March 18 to May 11, 184 separate pay increases were given, so that all employees received at least one pay increase and many received two within a period of less than two months. Moreover, the annual spring party was held two days before the election and at the party each employee was given a gold or silver watch (depending upon the length of service) and Anthony Preston announced (1) the adoption of an improved hospital insurance plan wholly paid for by the company; and (2) the fact that envelopes containing a slip upon which was written the amount of each person's bonus would be distributed the following Monday (election day).

At the same time the company was bestowing benefits, it was also bestowing advice. Circulars were delivered with the pay checks and additional ones were mailed to each employee's home. These circulars contained reminders of the possibility of the Preston's becoming disgusted and

of their putting all existing benefits up for negotiation and starting the bargaining from scratch; they also stated that "[i]f you feel conditions are bad now, they may be worse later." Each circular ended with the warning: "Don't cut your own throat next Monday, Vote No."

The union ultimately received only 45 of the 135 votes cast. Thereafter, it filed with the Board objections to the election and unfair labor practice charges against the company which were later incorporated into the Regional Director's complaint. The Board then scheduled a consolidated hearing before a Trial Examiner. Prior to the hearing, a group of employees formed a committee to keep the union out of the plant and were referred by the company's attorney to Edmund Wolven, a local attorney to represent them. There is no evidence in the record as to the source of Wolven's attorney's fees. Wolven met with various employees, first at an employee's home and subsequently in the plant. The latter conferences were held during working hours and with the permission of the company's personnel manager and president. Wolven interrogated the employees as to their union support and requested that they complete questionnaires which he had prepared with respect to their signing of the union authorization cards.

At the hearing before the Trial Examiner, Wolven sought to intervene on behalf of the employees who were his clients, but the Trial Examiner limited Wolven's intervention to those employees who had signed the authorization cards and only as to issues raised by their specific cards. Subsequently, it was agreed that the company attorney would call those employees whom Wolven had interviewed but could not now represent. The company's attorney then interviewed these prospective witnesses, again at the plant and with the permission of the management. At no time did either Wolven or the company's attorney advise those employees with whom they spoke that the employees did not have to answer their questions and that there would not be any retaliation if they chose not to cooperate.

The Trial Examiner concluded from all of the evidence in the record that the company had violated Section 8(a)

(1) of the Act by threatening employees with loss of employment and other economic retaliations, by promising and granting employees benefits in order to discourage their interest in the union, by furnishing aid and assistance to a group of anti-union employees, and by coercively interrogating employees about their union affiliation. The Trial Examiner also concluded that the company had violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the union and by making unilateral changes in wages and working conditions. He recommended that the company be ordered to cease and desist from its unfair labor practices and, affirmatively, to bargain with the union upon request. The Board adopted the findings of the Trial Examiner and entered the recommended orders.

II

These cases do not present any unique questions of law, but rather concern the reasonableness of the Board's findings and the appropriateness of its orders. Section 10(f) of the National Labor Relations Act provides that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall * * * be conclusive." Since the Board is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess * * *," this court may not "displace the Board's choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951). The Supreme Court has stated the general proposition that "[t]he judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286-287 (1934). And this court has noted the applicability of this principle to cases arising from orders issued by the National Labor Relations Board. *International Woodworkers of America v. N.L.R.B.*, 105 U.S.App.D.C. 37, 39,

263 F.2d 483, 485 (1959). The responsibility for determining the existence of substantial evidence in the record to support the findings and orders of the Board thus rests with the Court of Appeals, but the findings of the Board and the Trial Examiner, especially when, as in the instant case, they concur, are not lightly to be disregarded. *Edward Fields, Inc. v. N.L.R.B.*, 2 Cir., 325 F.2d 754, 759 (1963). Adhering, as we must, to these standards, we turn now to an examination of the principal issues raised in these cases.

III

The Board found that the company violated Section 8(a)(1) of the Act by threats and promises of benefits to its employees. An employer is not precluded by the Act from stating his own views as to whether or not his employees should join a union; indeed, Section 8(c) of the Act specifically provides that "[t]he expressing of any views, argument, or opinion * * * shall not constitute or be evidence of an unfair labor practice * * *." However, Section 8(c) also includes the qualification that "such expression contains no threat of reprisal or force or promise of benefit." Thus "[e]mployers still may not, under the guise of merely exercising their right of free speech, pursue a course of conduct designed to restrain and coerce their employees in the exercise of rights guaranteed them by the Act." *N.L.R.B. v. Gate City Cotton Mills*, 5 Cir., 167 F.2d 647, 649 (1948). An employer's predication of disastrous economic events may constitute an illegal threat if he has it in his power to make the predication come true. *International Union of Elec. Radio, etc. v. N.L.R.B.*, 110 U.S.App.D.C. 91, 97, 289 F.2d 757, 763 (1960). In this case, the plain meaning of the words used by the Preston brothers in their speeches to the assembled employees and in the circulars distributed to each of them, particularly in conjunction with their bluntly expressed hostility to the union, was that if the employees exercised their right to self-organization, the company could and would retaliate by eliminating bonuses, picnics and other existing benefits, imposing "dictorial working conditions," or closing the plant. Such

statements are well beyond the proper expression of views permitted under Section 8(c) and constitute sufficient evidence of a Section 8(a)(1) violation.

As to the promise and granting of benefits to employees, the law is well settled that, while a representation election is pending, the conferral of employee benefits for the purpose of inducing employees to vote against a union is unlawful. *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409-410 (1964); *Joy Silk Mills v. N.L.R.B.*, 87 U.S.App.D.C. 360, 367, 185 F.2d 732, 739 (1950), *cert. denied*, 341 U.S. 914 (1951). In the instant case, the evidence is unrefuted that 184 separate pay increases were given during a period of less than two months, that improvements in working conditions were effected, that an improved hospital insurance plan was adopted immediately before the election despite the fact that the company had refused to consider such a plan proffered by its insurance agent as late as February 1964, and that a gala party with presents and bonuses for all was held for the employees only two days before the election. Indeed, the company does not seriously contest these findings. Rather, it attempts to minimize their significance by elaborately describing the company as a "closely knit" organization where employer and employees are and have been "intimate" and "long-time neighborhood friends or school chums." However, resolving conflicting interpretations of particular facts is not within the province of this court, for the inferences to be drawn from the evidence are matters for the Trial Examiner and the Board. *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962); *Joy Silk Mills v. N.L.R.B., supra*, 87 U.S.App.D.C. at 369, 185 F.2d at 741. We are satisfied that there is sufficient evidence in the record considered as a whole to support the Board's findings that the flow of these new benefits prior to the election was primarily for the purpose of inducing the employees to vote against the union and was therefore unlawful. Accordingly, a remedial order is appropriate. *Cf. United Steelworkers of America v. N.L.R.B.*, ... U.S.App. D.C. ...., ... F.2d .... (No. 20,821, decided October 24, 1967), slip opinion p. 4.

IV

The Board also found that the company had violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the union when the union held valid authorization cards from over 50 per cent of the employees in an appropriate bargaining unit. The company correctly points to recent decisions by this court wherein we have held that the finding of a violation of an employer's statutory duty to bargain entails two prerequisite findings: first, that a majority of the employees freely and fairly reflected an intention to designate the union as their bargaining agent; and second, that the employer did not entertain a good faith doubt as to the authenticity of the cards. *Amalgamated Clothing Workers of America v. N.L.R.B.* [*Sagamore Shirt*], 124 U.S.App.D.C. 365, 373, 365 F.2d 898, 906 (1966).

The thrust of the company's attack is directed at the first point. It concedes that the cards are clear and unambiguous on their face and with this concession we are in complete agreement. The company argues, however, that 14 of the 78 cards should be discounted since the employees were misled by statements from union solicitors into thinking that signing a card meant only that they were voting for an NLRB election. Moreover, counsel for the company argues that even if the employees thought that *a* purpose of the cards (as contrasted with the *only* purpose) was for an NLRB election, this is a sufficient basis for discounting those cards. For this latter assertion, counsel relies very heavily on the recent Second Circuit opinion by Judge Friendly in *N.L.R.B. v. S. E. Nichols Co.*, 380 F.2d 438 (1967), wherein the court discounted three cards after its examination of the evidence convinced it that the employees had been misled although the union solicitor had not stated that the only purpose of the cards was to obtain an election.

This court has consistently upheld the rule, announced by the Board in *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268 (1963), *enforced*, 6 Cir., 351 F.2d 917 (1965), that where the cards are unambiguous on their face, unless employees were told that an election was the *only* purpose of the

cards, the employees would be held to the terms of the cards which they had signed. *Sagamore Shirt, supra,* 124 U.S.App.D.C. at 373-374, 365 F.2d at 906-907; *Amalgamated Clothing Workers of America v. N.L.R.B.* [*Hamburg Shirt*], ... U.S.App.D.C. ...., ..., 371 F.2d 740, 745 (1966). Once again, we approve the Board's use of that rule. It is entirely possible, of course, that in a particular case the credited evidence as to the circumstances under which the cards were signed would reveal such gross misstatement as to the union's intention with respect to an election,[1] or as to matters unrelated to an election, that the *Cumberland* rule would not be applied by the Board. Nor would we require its application, for given such gross misrepresentation the employee's signature on the card could not be construed as a fair and free designation of the union as his bargaining agent. Thus *Cumberland* does not articulate an absolute rule, but rather a useful and well founded rule of thumb.

Moreover, we think the Board was justified here in relying upon that rule in accepting the employees' signatures on the unambiguous cards despite the inconclusive testimony of a few as to the events surrounding the union's solicitation of the cards. Neither the Trial Examiner nor the Board found any credited evidence of gross misrepresentation, nor does the record reveal such evidence to us. Rather, we have here the classic case of employees testifying under the eye of the company officials about events which occurred almost a year before and prior to the ac-

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[1]In both *Nichols, supra* and *N.L.R.B.* v. *Swan Super Cleaners, Inc.*, 6 Cir., ... F.2d .... (No. 16,952, decided October 25, 1967), the unions did not petition the Board for an election, but rather sought to have the Board issue an order to bargain solely on the basis of the authorization cards, supported indirectly by the companies' subsequent unfair labor practices. In the instant case, however, the union requested the Board to hold an election and therefore union statements that one of the purposes of the cards was for an election were accurate representations of the union's intentions.

tivities which were subsequently found to constitute unfair labor practices. It is certainly conceivable that those same threats and benefits which shook an employee's original support for the union also altered that employee's memory as to events which occurred before the presentation of such threats and benefits.[2] By the time of the hearing the employees may well have changed their mind with respect to union affiliation, but the crucial question in a refusal to bargain case is whether the union had the support of a majority of the employees in an appropriate bargaining unit at the time the request to bargain was made, and not whether that support remains intact some ten months later. The Trial Examiner and the Board answered that question and there is sufficient evidence in the record to support their findings.

This last reference to the function of the Trial Examiner and the Board is closely related to yet an additional reason for supporting the Board's *Cumberland* rule. The *Nichols* rule would require us to examine all relevant testimony in detail, to adjudge the credibility of each witness, and to weigh the evidence. Yet, as noted above, the Board is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge," *Universal Camera Corp. v. N.L.R.B., supra,* 340 U.S. at 488, and it would be difficult to imagine a topic more clearly within this specialized field than the evaluation of the significance of the circumstances under which authorization cards are solicited. Accordingly, we affirm the Board's finding that the union did represent a majority of the employees at the time when it requested the Preston brothers to bargain.

This leaves only the question of whether the Preston brothers entertained a good faith doubt as to the authen-

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[2]Indeed, 10 of the 13 employees relied upon by the company had received not one but two pay increases during the "campaign" period. Surely the Board might well conclude that in the real world employer blandishments and coercion amounting to unfair labor practices during an election campaign can result in tailored testimony.

ticity of the authorization cards when the union tendered its request to bargain. The record is quite clear the answer is no; the Prestons refused to submit the cards to a neutral third party for verification; Anthony Preston testified that at that time he did not even think about whether the union had a majority or not; the Prestons requested the Board to deny the union's request for an immediate election since they "needed as much time as possible for the campaign"; and, finally, the Prestons committed unfair labor practices prior to the election in an attempt to dissipate the union's majority.

The Board, having found that the union had a valid majority, that the Preston's did not have a good faith doubt in refusing to bargain with the union, and that the Prestons committed unfair labor practices to erode the union's majority, was justified in finding a violation of Section 8(a)(5), setting aside the election because of employer misconduct, and issuing an order which included a provision requiring the company to bargain with the union. *Franks Bros. Co. v. N.L.R.B.*, 321 U.S. 702, 704 (1944); *Joy Silk Mills v. N.L.R.B., supra*, 87 U.S.App.D.C. at 372, 185 F.2d at 744.

V

The Board also found that several activities of the company subsequent to the election also violated Section 8(a)(1), specifically, the providing of assistance to an anti-union group of employees and the coercive interrogation of employees through its attorney. The company does not contest the Trial Examiner's finding that the company directed the anti-union employees committee to a local attorney to represent them[3]; authorized the use by the committee of its premises, facilities and personnel; and permitted workers to be interviewed during paid working time. These findings are supported by sufficient evidence in the record and are clearly a proper basis for the Board's

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[3]The record is unclear as to how the employees committee came to be organized and who suggested that the committee obtain counsel.

conclusion that the company aided and encouraged employees who were seeking to repudiate the union in violation of Section 8(a)(1). *See N.L.R.B. v. Scherer & Sons, Inc.*, 5 Cir., 370 F.2d 12, 13 (1966), *petition for cert. filed*, 35 U.S. L. WEEK 3422 (U.S. May 17, 1967) (No. 1397); *Edward Fields, Inc. v. N.L.R.B., supra*, 325 F.2d at 759-760; *N.L.R.B. v. Elias Brothers Big Boy, Inc.*, 6 Cir., 325 F.2d 360, 363 (1963).

The company contends that the interrogation of employees by its attorney did not violate Section 8(a)(1) because such interrogations "were absolutely *essential* to the preparation of Employer's case." This court has noted that, because of the conflicting interests involved, a delicate balance must be achieved between the employer's need to prepare adequately for pending unfair labor practice cases and the inherently coercive nature (in violation of an employee's Section 7 rights) of employer interrogation of employees during a labor dispute. *Joy Silk Mills v. N.L.R.B., supra*, 87 U.S.App.D.C. at 371-372, 185 F.2d at 743-744. In an attempt to strike such a balance, the Board has "established specific safeguards designed to minimize the coercive impact of such employer interrogation. Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature * * *." *Johnnie's Poultry Co.*, 146 N.L.R.B. 770, 775 (1964). *Cf. International Union of Operating Eng., Local 49 v. N.L.R.B.*, 122 U.S. App.D.C. 314, 316-318, 353 F.2d 852, 854-856 (1966).

There is sufficient evidence in the record to support the finding of the Trial Examiner and the Board that in this case some of these safeguards were conspicuously absent: the interrogation occurred in the plant's conference room; only a most general explanation was given of why the information requested was being sought; and the attorney did not specifically state that the employees could choose not to cooperate and in the event they so chose no reprisals would be taken. The company argues that such safeguards

were not necessary here where the employees had already spoken with the attorney representing their fellow employees. This argument does not, however, meet the objection to such interrogations, for when an employee is told that his testimony would be helpful to both the employer and the anti-union employees committee, he might reasonably suspect that any indication that he signed the card because of a desire for union representation would result in retaliations from either or both the company and his anti-union fellow workers. Accordingly, we affirm the Board's finding that the company violated Section 8(a)(1) by coercively interrogating employees with respect to union activities.

VI

Counsel for the company alleges that it was precluded from giving an orderly, effective presentation of its case by three rulings made by the Trial Examiner at the unfair labor practice hearing. We find this allegation to be without merit. The specific rulings in question are: (1) limiting Wolven's intervention to only those employees who had signed authorization cards and only as to issues raised by those specific cards; (2) requiring every employee to state the name of the union solicitor who had solicited his card before permitting him to testify with reference to the comments made by that solicitor; and (3) declining to rule immediately on the General Counsel's motion to strike the testimony of each witness whose pre-hearing statement had not been produced by the company.

The first claim is easily disposed of since Section 10(b) specifically provides, *inter alia*, that intervention is a matter of discretion for the Trial Examiner or the Board and we find no abuse. *See also Semi-Steel Casting Co. v. N.L.R.B.*, 8 Cir., 160 F.2d 388, 393, *cert. denied*, 332 U.S. 758 (1947). The second and third claims also relate to the exercise of Board discretion and again we find no abuse. Moreover, no prejudice is shown, since eventually all of the employees whose testimony was desired by the company were able to identify the persons who had solicited their cards and the Trial Examiner ultimately denied the General Counsel's motion to strike.

VII

We come lastly to the principal issue raised in the union's petition to review the Board's order. The union asserts that, although the Board sustained its charges as to the company's violation of Sections 8(a)(1) and 8(a)(5), it summarily dismissed the union's request for compensatory relief for the employees for the period during which the company wrongfully refused to bargain. The union argues that it is incumbent upon the Board to elaborate the grounds for a grant or denial of discretionary relief, *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941), and that therefore a remand is required as a matter of law. We find it unnecessary to reach this issue, since subsequent to its rejection of the union's request the Board reconsidered the question of the appropriateness of compensatory relief and has itself petitioned this court to remand that part of the April 22 order which pertains to compensatory relief. It is the intention of the Board to evaluate this suggested relief in the light of variant fact patterns, of which this case is only one, and in that way contribute to the orderly development of the law.

Accordingly, the Board's petition for enforcement of its order is granted, except for that portion which dismisses the union's request for compensatory relief, and the company's petition for review is denied.

So ordered.

Senior Circuit Judge WILBUR K. MILLER dissents and calls attention to the case of *NLRB v. Swan Super Cleaners, Inc.*, decided by the Sixth Circuit October 25, 1967, No. 16952. In that case the court discussed its ruling in *NLRB v. Cumberland Shoe Corp.*, 351 F.(2d) 917 (6th Cir. 1965), and concluded, in a factual situation much like that involved here, that authorization cards obtained by misrepresentation as to their purpose must be invalidated, even though the unambiguous language of the cards amounts to a choice of the union as bargaining representative.

APPENDIX B

(Filed December 18, 1967)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,137

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

PRESTON PRODUCTS COMPANY, INC., Intervenor

No. 20,185

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

PRESTON PRODUCTS COMPANY, INC., Respondent

No. 20,301

PRESTON PRODUCTS COMPANY, INC., Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, Intervenor

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DECREE

Before: Wilbur K. Miller, Senior Circuit Judge and Danaher and Wright, Circuit Judges.

The consolidated cases were submitted to this Court upon the petitions of Preston Products Company, Inc. and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO to review, and the petition of the National Labor Relations Board to enforce, an order of the National Labor Relations Board issued by it on April 22, 1966, against Preston Products Company, Inc., its officers, agents, successors and assigns. The Court heard argument of respective counsel on September 28, 1967, and has considered the briefs and transcript of record filed in these proceedings. On November 14, 1967, the Court, being fully advised in the premises, handed down its opinion granting enforcement of the Board's order in the above matter against the Company, denying the Company's petition for review, and remanding to the Board for further consideration the question of the appropriateness of compensatory relief requested by the Union. The Court entered judgment accordingly. In conformity therewith, it is hereby,

ORDERED, ADJUDGED AND DECREED by the Court that the said order of the National Labor Relations Board against Preston Products Company, Inc. be enforced; that Preston Products, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained; and that the Union's request for compensatory relief previously denied by the Board be remanded to the Board for further consideration.

Wilbur K. Miller
Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

John A. Danaher
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

J. Skelly Wright
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRESTON PRODUCTS COMPANY, INC.

and

Cases Nos. 7-CA-4726
7-RC-6197

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO

DECISION AND ORDER

On November 15, 1965, Trial Examiner Stanley N. Ohlbaum issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended the dismissal of these allegations. Thereafter, Respondent filed exceptions with a supporting brief.[1] The General Counsel filed cross exceptions.[2] The Charg-

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[1] Respondent's motion to quash parts of the Charging Party's brief is denied inasmuch as we find that the *remedial order requested by the Charging Party is without merit.*

[2] The General Counsel excepted to the Trial Examiner's failure to find that Edmond R. Wolven was an agent of Respondent within the meaning of Section 2(3) of the Act; that Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees through Wolven; and the failure of the Trial Examiner to count certain additional authorisation cards as valid union designations. We find it unnecessary to consider or to make findings with respect to these exceptions because the requested findings if made, would be only cumulative in nature and the additional cards, if counted, would not affect Petitioner's majority status.

APPENDIX D

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining

and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

No. 1367

In the Supreme Court of the United States

October Term, 1967

PRESTON PADDOCK COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

DEWEY S. CARLTON,
Assistant General Counsel,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1367

PRESTON PRODUCTS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The question presented—whether the National Labor Relations Board properly held that cards signed by a majority of the employees in a collective bargaining unit which authorized the Union to represent them for bargaining purposes [1] established the Union's representative status, where Union solicitors, although indicating that the cards could be used

[1] The authorization cards read (J.A. 654):

"UAW AUTHORIZATION CARD

"I, the undersigned, hereby designate, select and empower the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) as my representative for the purpose of collective bargaining in respect to rate of pay, wages, hours of employment, working conditions and other conditions of employment."

307-409—68

for a Board election, did not represent that the cards would be used only for that purpose—involves the validity of the Board's *Cumberland Shoe* rule (*Cumberland Shoe Corp.*, 144 NLRB 1268, enforced, 351 F. 2d 917 (C.A. 6)). This is the same issue which the Board presented in its petition for certiorari in *National Labor Relations Board* v. *Crawford Manufacturing Co.*, No. 1050, this Term, which the Court denied on April 22, 1968. Although the considerations which prompted the Court to deny certiorari in No. 1050 may indicate that review should be denied in this case, we continue to believe, for the reasons set forth in our petition in No. 1050, that the issue warrants resolution by this Court.[2] Accordingly, although we further believe that the court below correctly sustained the Board's finding that the Union had valid authorizations from a majority of the employees, we do not oppose the present petition.[3]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1968.

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[2] See also *National Labor Relations Board* v. *Southland Paint Co.*, No. 24275 (C.A. 5), decided May 8, 1968, 68 LRRM 2169.

[3] The Union, which is a party here but is not filing a separate response, has asked us to advise the Court that it, too, does not oppose the petition.

U.S. GOVERNMENT PRINTING OFFICE: 1968